**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 0 2 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth M'Cormick

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center (director). Subsequently, the director revoked the approval of the Form I-140, Immigrant Petition for Alien Worker.[1] The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is an IT consulting business. It seeks to employ the beneficiary permanently in the United States as a computer programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director revoked the approval of the petition on July 2, 2012, stating that the petitioner had failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

On June 27, 2013, the AAO dismissed the appeal, holding that the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date onwards. The decision also found that the petitioner did not establish that a *bona fide* job offer existed. The petitioner then filed a motion to reopen and reconsider the AAO decision. We will accept the motion to reopen based on new evidence submitted and the motion to reconsider based on arguments made by counsel. Thus, the instant motions are granted. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

As a preliminary matter, on motion counsel states that the previous AAO decision did not conform to the requirements of *Matter of Mata,* 15 I&N Dec. 524 (BIA 1975). Specifically, counsel states that *Matter of Mata* stands for the premise that all bases for revocation must be raised in the initial Notice of Intent to Revoke (NOIR). Here, counsel states that the question of whether the job was *bona fide* was not raised in the director's NOIR and thus cannot form the basis for revocation. *Matter of Mata* does not state *when* a petitioner must be notified of adverse information, but instead stands for the proposition that notification must be made. The director's decision cited to a site visit of the petitioner's premises and a visit to one of the petitioner's officers, requesting information concerning the petitioner's employees' duties and work location. In addition, the AAO provided such notice in a May 2013 Request for Evidence (RFE). The petitioner did thus have notice of the

[1] Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

issue of whether the job offer was *bona fide* and any failure to notify the petitioner prior to the Notice of Revocation was cured by the May 2013 RFE. As a result, both issues of whether the petitioner was able to pay the proffered wage from the priority date onwards and whether the job offer was *bona fide* are appropriate issues underlying the revocation.

Concerning the petitioner's ability to pay the proffered wage, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

As noted in the AAO's prior decision, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on April 22, 2008. The proffered wage as stated on the ETA Form 9089 is $87,006 per year.

In the AAO's June 27, 2013 decision, we specifically reviewed evidence of the petitioner's ability to pay the proffered wage in the form of Internal Revenue Service (IRS) Forms W-2 from 2008 through 2012 stating that it paid the beneficiary $58,656.00 in 2008, $52,732.80 in 2009, $63,992.00 in 2010, $83,213.60 in 2011, and $82,162.40 in 2012. The AAO decision also considered the petitioner's Form 1120, U.S. Corporation Income Tax Return stating net income of $12,632 and net current assets of $97,812 in 2008; net income of $13,051 and net current assets of $107,445 in 2009; net income of $3,258 and net current assets of $106,412 in 2010; and net income of $13,116 and net current assets of $109,732 in 2011.

Although the petitioner's net income or net current assets were higher than the proffered wage or difference between the actual wage paid and the proffered wage in 2008, 2009, 2010, and 2011, we were unable to conclude that the petitioner demonstrated its ability to pay the proffered wage in these years because USCIS records indicate that the petitioner filed four additional Form I-140 petitions. The petitioner's CEO, [redacted] stated in response to the AAO's RFE that each of the four additional workers have resigned from the company. With its motion, the petitioner submitted the withdrawal letters for the other four sponsored workers.[2] Two letters dated July 10, 2013 sought to withdraw the petition for [redacted] a March

[2] In response to the AAO's RFE, the petitioner submitted evidence that it withdrew the non-immigrant Form I-129 petitions for the sponsored workers, not the immigrant petitions cited in the decision.

10, 2012 letter sought to withdraw the petition sponsoring [redacted] and a July 25, 2011 letter sought to withdraw the petition sponsoring [redacted].[3]

On motion, counsel asserts that the petitioner has repeatedly stated its intent not to employ the other sponsored workers and, as such, the actual withdrawal was unnecessary in determining the petitioner's ability to pay the proffered wage. The AAO accepts the petitioner's intent to withdraw and no longer employ the other sponsored workers, however the petitioner must still demonstrate its ability to pay each sponsored worker from their respective priority date to the date of withdrawal.

Despite being specifically requested to provide the evidence in the AAO's RFE and the previous AAO decision citing the necessity of having such evidence, the petitioner submitted no evidence about the priority dates or the proffered wages listed on the filed petitions the proffered wages for the beneficiary of that other petition.[4] As stated in the previous AAO decision, without this information, the AAO cannot make a positive determination regarding the petitioner's ability to pay using its net income or net current assets.[5]

Counsel alternatively asserts that USCIS improperly relied upon these particular petitions because they were not specifically, by name listed in the NOIR, the Notice of Revocation (NOR), or the AAO's RFE to provide notice to the petitioner. Counsel cites *Matter of Air India "Flight No. 101,"* 21 I&N Dec. 890, 891-92 (BIA 1997), for the premise that specificity is required. *Matter of Air India "Flight No. 101"* is a case involving a decision issued by the director stating simply "It was determined by a review of the evidence submitted and argued, that the carrier has not submitted

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[3] The petitioner stated on appeal that Ms. [redacted] resigned on December 1, 2007, but as noted in the previous AAO decision, submitted a Form W-2 for Ms. [redacted] for 2008. The Form W-2 from 2008 reflects that the petitioner paid Ms. [redacted] $21,120 in that year. It is unclear why the petitioner would have been paying Ms. [redacted] in 2008 when she resigned in December 2007. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988),

[4] We note that the petitioner was notified in the RFE that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denial. *See* 8 C.F.R. 103.2(b)(14) (failure to submit the requested information precludes a material line of inquiry and forms an independent basis for denial).

[5] We note that in the NOR, the director calculated the wages owed to the sponsored beneficiaries as follows:

| Year | Wage burden (Total proffered wages less wages paid) |
|---|---|
| 2008 | $96,266.00 |
| 2009 | $149,417.00 |
| 2010 | $205,975.00 |

The petitioner has never objected to this calculation or questioned its accuracy. Nor did the petitioner submit alternative evidence to demonstrate that it had the ability to pay the wages owed to all beneficiaries for the years in question.

sufficient documentation to warrant termination of the fine proceedings." *Id.* at 891. The BIA cited 8 C.F.R. § 103.3(a)(1) in determining that insufficient detail existed in the director's decision concerning the reason for denial. Neither the *Matter of Air India* decision nor the regulation requires USCIS to include every detail for every basis of denial. Instead, the BIA interpreted the regulation to mean that the "detail" required must be such to ensure that the director considered all arguments that the carrier set forth in its defense to "put the carrier on notice concerning the issues which the director finds determinative" and to provide the BIA with "a meaningful basis for review." In the instant case, stating that additional workers had been sponsored meets both prongs of the BIA's requirements in that both the petitioner and the AAO were informed as to the dispositive issue and the basis for review. Further, as the petitioner filed the Form I-140 petitions, it is aware of the information contained in those petitions including the identity of the sponsored workers and would not need specificity in order to identify those petitions to which the director's NOR referred.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted no new evidence concerning the proffered wage or the priority date for any of the other sponsored workers. As stated in the prior AAO decision, without such evidence, we are unable to determine the petitioner's overall wage obligations per year or if the petitioner demonstrated the means to meet those obligations. In addition, the petitioner's IRS Forms 1120 demonstrate a decline in gross receipts from 2008 through 2011 as well as a decline in the amount of salaries and wages paid over that same time. The petitioner submitted no evidence that it had one off year, incurred uncharacteristic expenses, or experienced some other situation that would liken it to *Sonegawa.* Thus, assessing the totality of the circumstances in this individual case, it is

concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Concerning the issue regarding whether a *bona fide* job offer exists, counsel asserts on motion that the petitioner never indicated that the beneficiary was or would be working at the petitioner's headquarter location in [redacted] California. Counsel states that USCIS improperly relied upon the address listed in Section K as the worksite location in determining the offer was not *bona fide* or that the information provided therein indicated that the beneficiary was located in California while working for the petitioner.

On the ETA Form 9089, Section H, the petitioner listed the "primary worksite (where work is to be performed)" as [redacted] On motion, counsel states that the petitioner has a location at [redacted] and provides evidence to support this statement in the form of a lease of office space and verification from the leasing company that the petitioner has operated in the space since August 17, 2009. The director's NOR and the previous AAO decision noted that a site visit was conducted of the premises listed on the Form I-140 and ETA Form 9089 and that the premises seemed not to be operational or large enough to employ the petitioner's stated workforce of 21 employees.

It is noted that the approved labor certification does not mention the possibility of working at client sites or at various unanticipated locations, nor does it mention travel or remote work. The language in H.11 used in crafting the job description, states that the beneficiary would be "required to coordinate all technical jobs both on-site and off shore," and does not indicate placement at end-user client sites, travel to unanticipated locations or remote work. Without such language, the DOL did not have notice of the actual geographic area of intended employment and could not accurately determine the prevailing wage for the position. 8 U.S.C. § 204.5(l)(3)(i).

Counsel also asserts that the petitioner's premises need not be large enough for its full workforce, but only provide space for the sponsored worker. While it is true that the petitioner need only demonstrate it has space for the sponsored worker, if its premises does not have space for the number of workers indicated on the Form I-140, the presumption arises that the full work force claimed would not have space to work. Counsel states that the number of the petitioner's employees has diminished due to the other sponsored workers departing its employ, however, no evidence was submitted regarding the total workforce and the actual space available. For example, the petitioner may have hired U.S. workers to replace the other sponsored workers. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence in the record does not establish that the petitioner either has the physical space to employ the beneficiary at the location indicated on the ETA Form 9089 as the primary workspace nor does it establish that it ever intended to employ the beneficiary at that workspace. Therefore, we find that the petitioner has not established that a realistic and *bona fide* job offer exists, as it was described on the approved labor certification application.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende,* 26 I&N Dec. 127 (BIA 2013). Here, that burden has not been met.

**ORDER**: The motions are granted, the previous decision of the AAO is affirmed, and the petition remains denied.